

TITLE 78 RECODIFICATION - TITLE 78B**CHAPTER 10**

2008 GENERAL SESSION

STATE OF UTAH

LONG TITLE**General Description:**

Title 78B, Chapter 10, Utah Uniform Mediation Act.

Highlighted Provisions:

This bill:

►

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**RENUMBERS AND AMENDS:**

78B-10-101, (Renumbered from 78-31c-101, as enacted by Laws of Utah 2006, Chapter 33)

78B-10-102, (Renumbered from 78-31c-102, as enacted by Laws of Utah 2006, Chapter 33)

78B-10-103, (Renumbered from 78-31c-103, as enacted by Laws of Utah 2006, Chapter 33)

78B-10-104, (Renumbered from 78-31c-104, as enacted by Laws of Utah 2006, Chapter 33)

78B-10-105, (Renumbered from 78-31c-105, as enacted by Laws of Utah 2006, Chapter 33)

78B-10-106, (Renumbered from 78-31c-106, as enacted by Laws of Utah 2006, Chapter 33)

78B-10-107, (Renumbered from 78-31c-107, as enacted by Laws of Utah 2006, Chapter 33)

32 **78B-10-108**, (Renumbered from 78-31c-108, as enacted by Laws of Utah 2006, Chapter
33 33)
34 **78B-10-109**, (Renumbered from 78-31c-109, as enacted by Laws of Utah 2006, Chapter
35 33)
36 **78B-10-110**, (Renumbered from 78-31c-110, as enacted by Laws of Utah 2006, Chapter
37 33)
38 **78B-10-111**, (Renumbered from 78-31c-111, as enacted by Laws of Utah 2006, Chapter
39 33)
40 **78B-10-112**, (Renumbered from 78-31c-112, as enacted by Laws of Utah 2006, Chapter
41 33)
42 **78B-10-113**, (Renumbered from 78-31c-113, as enacted by Laws of Utah 2006, Chapter
43 33)
44 **78B-10-114**, (Renumbered from 78-31c-114, as enacted by Laws of Utah 2006, Chapter
45 33)

46

47 *Be it enacted by the Legislature of the state of Utah:*

48 Section 1. Section **78B-10-101**, which is renumbered from Section 78-31c-101 is
49 renumbered and amended to read:

50 **CHAPTER 10. UTAH UNIFORM MEDIATION ACT**

51 ~~[78-31c-101].~~ **78B-10-101. Title.**

52 This chapter is known as the "Utah Uniform Mediation Act."

53 Section 2. Section **78B-10-102**, which is renumbered from Section 78-31c-102 is
54 renumbered and amended to read:

55 ~~[78-31c-102].~~ **78B-10-102. Definitions.**

56 As used in this chapter:

57 (1) "Mediation" means a process in which a mediator facilitates communication and
58 negotiation between parties to assist them in reaching a voluntary agreement regarding their
59 dispute.

60 (2) "Mediation communication" means conduct or a statement, whether oral, in a
61 record, verbal, or nonverbal, that occurs during a mediation or is made for purposes of
62 considering, conducting, participating in, initiating, continuing, or reconvening a mediation or

63 retaining a mediator.

64 (3) "Mediation party" means a person that participates in a mediation and whose
65 agreement is necessary to resolve the dispute.

66 (4) "Mediator" means an individual who is neutral and conducts a mediation.

67 (5) "Nonparty participant" means a person, other than a party or mediator, that
68 participates in a mediation.

69 (6) "Person" means an individual, corporation, estate, trust, business trust, partnership,
70 limited liability company, association, joint venture, government, governmental subdivision,
71 agency, or instrumentality, public corporation, or any other legal or commercial entity.

72 (7) "Proceeding" means:

73 (a) a judicial, administrative, arbitral, or other adjudicative process, including related
74 prehearing and posthearing motions, conferences, and discovery; or

75 (b) a legislative hearing or similar process.

76 (8) "Record" means information that is inscribed on a tangible medium or that is stored
77 in an electronic or other medium and is retrievable in perceivable form.

78 (9) "Sign" means:

79 (a) to execute or adopt a tangible symbol with the present intent to authenticate a
80 record; or

81 (b) to attach or logically associate an electronic symbol, sound, or process to or with a
82 record with the present intent to authenticate a record.

83 Section 3. Section **78B-10-103**, which is renumbered from Section 78-31c-103 is
84 renumbered and amended to read:

85 **[78-31c-103]. 78B-10-103. Scope.**

86 (1) Except as otherwise provided in Subsection (2) or (3), this chapter applies to a
87 mediation in which:

88 (a) the mediation parties are required to mediate by statute, court, or administrative
89 agency rule or referred to mediation by a court, administrative agency, or arbitrator;

90 (b) the mediation parties and the mediator agree to mediate in a record that
91 demonstrates an expectation that mediation communications will be privileged against
92 disclosure; or

93 (c) the mediation parties use as a mediator an individual who holds himself or herself

out as a mediator or the mediation is provided by an entity that holds itself out as providing mediation.

(2) The chapter does not apply to a mediation:

(a) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(b) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the chapter applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(c) conducted by a judge who might make a ruling on the case; or

(d) conducted under the auspices of:

(i) a primary or secondary school if all the parties are students; or

(ii) a correctional institution for youths if all the parties are residents of that institution.

(3) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections ~~[78-31c-104 through 78-31c-106]~~ 78B-10-104 through 78B-10-106 do not apply to the mediation or part agreed upon. However, Sections ~~[78-31c-104 through 78-31c-106]~~ 78B-10-104 through 78B-10-106 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Section 4. Section **78B-10-104**, which is renumbered from Section 78-31c-104 is renumbered and amended to read:

~~[78-31c-104].~~ **78B-10-104. Privilege against disclosure -- Admissibility -- Discovery.**

(1) Except as otherwise provided in Section ~~[78-31c-106]~~ 78B-10-106, a mediation communication is privileged as provided in Subsection (2) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section ~~[78-31c-105]~~ 78B-10-105.

(2) In a proceeding, the following privileges apply:

(a) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(b) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(c) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Section 5. Section **78B-10-105**, which is renumbered from Section 78-31c-105 is renumbered and amended to read:

~~[78-31c-105].~~ 78B-10-105. Waiver and preclusion of privilege.

(1) A privilege under Section ~~[78-31c-104]~~ 78B-10-104 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation, and:

(a) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(b) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(2) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section ~~[78-31c-104]~~ 78B-10-104, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(3) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section ~~[78-31c-104]~~ 78B-10-104.

Section 6. Section **78B-10-106**, which is renumbered from Section 78-31c-106 is renumbered and amended to read:

~~[78-31c-106].~~ 78B-10-106. Exceptions to privilege.

(1) There is no privilege under Section ~~[78-31c-104]~~ 78B-10-104 for a mediation communication that is:

(a) in an agreement evidenced by a record signed by all parties to the agreement;

(b) available to the public under Title 63, Chapter 2, Government Records Access and Management Act, or made during a mediation session which is open, or is required by law to be open, to the public;

(c) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(d) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(e) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(f) except as otherwise provided in Subsection (3), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(g) subject to the reporting requirements in Section 62A-3-305 or 62A-4a-403.

(2) There is no privilege under Section ~~[78-31c-104]~~ 78B-10-104 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that:

(a) the evidence is not otherwise available;

(b) there is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and

(c) the mediation communication is sought or offered in:

(i) a court proceeding involving a felony or misdemeanor; or

(ii) except as otherwise provided in Subsection (3), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(3) A mediator may not be compelled to provide evidence of a mediation communication referred to in Subsection (1)(f) or (2)(c)(ii).

(4) If a mediation communication is not privileged under Subsection (1) or (2), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under Subsection (1) or (2) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Section 7. Section **78B-10-107**, which is renumbered from Section 78-31c-107 is renumbered and amended to read:

~~[78-31c-107].~~ **78B-10-107. Prohibited mediator reports.**

(1) Except as required in Subsection (2), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a

mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(2) A mediator may disclose:

(a) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(b) a mediation communication as permitted under Section ~~[78-31c-106]~~ 78B-10-106; or

(c) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(3) A communication made in violation of Subsection (1) may not be considered by a court, administrative agency, or arbitrator.

Section 8. Section **78B-10-108**, which is renumbered from Section 78-31c-108 is renumbered and amended to read:

~~[78-31c-108].~~ **78B-10-108. Confidentiality.**

Unless subject to Title 52, Chapter 4, Open and Public Meetings Act, and Title 63, Chapter 2, Government Records Access and Management Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

Section 9. Section **78B-10-109**, which is renumbered from Section 78-31c-109 is renumbered and amended to read:

~~[78-31c-109].~~ **78B-10-109. Mediator's disclosure of conflicts of interest -- Background.**

(1) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(a) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(b) disclose any known fact to the mediation parties as soon as practical before accepting a mediation.

(2) If a mediator learns any fact described in Subsection (1)(a) after accepting a mediation, the mediator shall disclose it as soon as practicable.

(3) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(4) Subsections (1), (2), (3), and (6) do not apply to an individual acting as a judge or ombudsman.

(5) This chapter does not require that a mediator have a special qualification by background or profession.

(6) A mediator must be impartial, unless after disclosure of the facts required in Subsections (1) and (2) to be disclosed, the parties agree otherwise.

Section 10. Section **78B-10-110**, which is renumbered from Section 78-31c-110 is renumbered and amended to read:

~~[78-31c-110].~~ **78B-10-110. Participation in mediation.**

An attorney or other individual designated by a party may accompany the party to, and participate in, a mediation. A waiver of participation given before the mediation may be rescinded.

Section 11. Section **78B-10-111**, which is renumbered from Section 78-31c-111 is renumbered and amended to read:

~~[78-31c-111].~~ **78B-10-111. International commercial mediation.**

(1) In this section:

(a) "International commercial mediation" means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) "Model Law" means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002.

(2) Except as otherwise provided in Subsections (3) and (4), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(3) Unless the parties agree in accordance with Subsection ~~[78-31c-103]~~ **78B-10-103**(3) that all or part of an international commercial mediation is not privileged, Sections ~~[78-31c-104 through 78-31c-106]~~ **78B-10-104 through 78B-10-106** and any

applicable definitions in Section ~~[78-31c-102]~~ 78B-10-102 of this chapter apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections ~~[78-31c-104 through 78-31c-106]~~ 78B-10-104 through 78B-10-106.

(4) If the parties to an international commercial mediation agree under Article 1, Section (7), of the Model Law that the Model Law does not apply, this chapter applies.

Section 12. Section **78B-10-112**, which is renumbered from Section 78-31c-112 is renumbered and amended to read:

~~[78-31c-112].~~ **78B-10-112. Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

Section 13. Section **78B-10-113**, which is renumbered from Section 78-31c-113 is renumbered and amended to read:

~~[78-31c-113].~~ **78B-10-113. Uniformity of application and construction.**

In applying and construing this chapter, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 14. Section **78B-10-114**, which is renumbered from Section 78-31c-114 is renumbered and amended to read:

~~[78-31c-114].~~ **78B-10-114. Application to existing agreements or referrals.**

(1) This chapter governs a mediation pursuant to a referral or an agreement to mediate made on or after May 1, 2006.

(2) Notwithstanding Subsection (1), on or after May 1, 2007, this chapter governs all agreements to mediate whenever made.